

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
FOURTH REGION**

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WYMAN GORDON PENNSYLVANIA, LLC	:	
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	:	
v.	:	CASES 04-CA-182126,
	:	04-CA-186281, and
UNITED STEEL, PAPER AND FORESTRY,	:	04-CA-188990
RUBBER, MANUFACTURING, ENERGY,	:	
ALLIED-INDUSTRIAL AND SERVICE	:	
WORKERS INTERNATIONAL UNION,	:	
AFL-CIO/CLC	:	
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**RESPONDENT’S OPPOSITION TO THE GENERAL COUNSEL’S
MOTION IN LIMINE**

I. INTRODUCTION

COMES WYMAN GORDON PENNSYLVANIA, INC (hereinafter referred to as “Respondent” or “Wyman Gordon”) files this Opposition to the General Counsel’s Motion in Limine (the “Motion”).

On the fifth and final day of hearing in this matter, the General Counsel filed its Motion to exclude evidence that was not in Respondent’s possession at the time of the withdrawal, or that was in Respondent’s possession but upon which Respondent did not base its decision to withdraw. Via footnote, the General Counsel further renewed its request to exclude evidence regarding employees’ subjective reasons for supporting the decertification petition. The General Counsel bases these requests on the argument that such evidence is irrelevant.

The General Counsel’s Motion is flawed for numerous reasons. First, it is so vague that it fails to identify what evidence the General Counsel actually seeks to exclude. Second, with regard to the *Levitz*¹ standard governing the Employer’s burden to establish the Union’s loss of majority

¹ *Levitz Furniture Co.*, 333 NLRB 717 (2001)

support when withdrawing recognition, some of the evidence likely encompassed by the Motion was indeed known and relied upon by Wyman Gordon when it withdrew recognition. Such evidence is objective, not subjective, and cannot be excluded. Third, it is the General Counsel's burden to establish that the petition was deficient upon the Respondent's production of a petition signed by a majority of unit employees. Therefore, evidence likely encompassed by the Motion is relevant to thwart any such allegations made by the General Counsel. In other words, the evidence is not offered to establish what the Employer knew when it withdrew recognition, but to rebut any claims from the General Counsel that certain signatures should be ignored. Fourth and finally, the General Counsel relies on the *Levitz* burden regarding withdrawing recognition generally, while ignoring the *Master Slack*² burden related to determining whether unfair labor practices taint a withdrawal. Under the *Master Slack* analysis, subjective evidence can be allowed, and is certainly relevant to the factors outlined by the Board.

Accordingly, Wyman Gordon respectfully requests that Your Honor deny the General Counsel's motion.

II. ARGUMENT

A. The Motion Should be Denied Because it Fails to Identify the Evidence it Seeks to Exclude.

Judges have the authority to rule on motions in limine seeking to limit issues or evidence to be presented at a hearing. NLRB Bench Book § 10-100. However, the evidence sought to be precluded needs to be identified. *See, e.g., TNT Logistics*, 356 NLRB 1301 n. 1 (2006) (ALJ properly granted the General Counsel's prehearing motion in limine to strike *seven of the respondent's eight affirmative defenses* as they were not relevant to the complaint allegations)(emphasis added); *Farm Fresh Company, Target One*, 361 NLRB No. 83, slip op. at 1

² *Master Slack Corp.*, 271 NLRB 78 (1984).

n. 1 (2014) (ALJ did not abuse his discretion by granting the General Counsel's motion in limine to exclude *certain direct questions* about the alleged discriminatees' immigration status)(emphasis added).

The General Counsel's Motion fails to identify a single piece of evidence it seeks to exclude, with the exception of its footnote renewal of its previous motion to exclude subjective evidence from petition-signers. Rather, it vaguely refers to evidence Wyman Gordon was not in possession of, or was in possession of but upon which it did not rely to withdraw recognition. This request is far too ambiguous for Wyman Gordon, or Your Honor, to reasonably understand what evidence the General Counsel seeks to exclude. Unlike the cases in which motions in limine are granted, the General Counsel fails to expressly ask for specific evidence to be excluded. This ambiguous request is not appropriate and must be denied.

B. Some of the Evidence Likely Sought to be Excluded Was Relied Upon.

The General Counsel's Motion is based upon the contention that evidence not in Wyman Gordon's possession, or in its possession but not relied upon in withdrawing recognition, is irrelevant. Assuming the Motion is aimed at the petition-signers' testimony, this is inaccurate. Some of the information confirmed by the petition-signers was in fact in Wyman Gordon's possession and relied upon. For example, whether a petition-signer was employed and voted during the Union election was known to the Employer and relied upon in withdrawing recognition. *See, e.g.* testimony of Joshua Antosh, Tr. 775:20-24. Counsel and lead negotiator for Wyman Gordon, Rick Grimaldi, testified that Wyman Gordon ceded to the employees' demand to withdrawal recognition based on the petition, the one-margin vote in the election, and the fact that there had been turnover and shrinkage to the bargaining unit. (Tr. 698:12-24). Therefore, testimony related to prior voting and the narrow margin of Union support at the time of election, as well as whether

the petition-signers were employed at the time of the election, was indeed known and relied upon by Wyman Gordon. Therefore, such evidence cannot be excluded.

This point further illustrates the overbroad and vague nature of the General Counsel's request. The General Counsel's blanket Motion cannot be granted, as it would require ignoring relevant evidence that was indeed known and relied upon. Accordingly, the Motion must be denied.

C. The Evidence is Appropriate to Thwart Evidence Offered by the General Counsel in Meeting its Burden.

The General Counsel's Motion focuses on Wyman Gordon's burden to establish that the Union lost majority support at the time of Respondent's withdrawal. In doing so, the General Counsel ignores its own burden. The General Counsel fails to understand that the evidence offered is relevant to rebut any potential attack by the General Counsel on the veracity of the petition.

After the General Counsel has established a withdrawal of recognition at the hearing, the Respondent meets its defensive burden by introducing a petition ostensibly signed by at least half of the unit employees. *Flying Foods Grp. dba Flying Foods*, 345 NLRB 101, n. 9 (2005). At that juncture, the burden shifts to the General Counsel to show that some of the alleged signatures should not be counted. *Id.*

The General Counsel repeatedly and vaguely represented that it did in fact intend to question the veracity of the petition. In fact, the Motion itself notes that during a March 15, 2018 conference call with Your Honor and the parties, the General Counsel "specifically stated...that it intended to hold Respondent to its burden." However, the General Counsel refused to provide any details regarding the identity of witnesses and whether any would be used to attack the petition itself. Further, the General Counsel repeatedly stated throughout this proceeding that it intended

to call “possible rebuttal witnesses” and “neutral witnesses under subpoena,” but never identified same.

Therefore, after Wyman Gordon met its burden of establishing the Union’s loss of majority support by introducing the petition, it proactively offered evidence quelling any potential testimony from the General Counsel that might suggest that the petition signatures were not authentic or were not properly obtained, and thus should not be counted. In fact, the Employer was able to account for all signatures on the petition through six witnesses. These witnesses confirmed who collected what signatures and under what circumstances. The testimony objectively establishes that all signatures were properly obtained. This is highly relevant to thwarting any potential argument by the General Counsel in meeting its burden that the petition fails to establish a lack of majority support for the Union.

Further, the Board has rejected the argument that withdrawal of recognition is unlawful when the employer fails to verify the authenticity of a disaffection petition before withdrawing recognition. *Flying Foods Grp. dba Flying Foods* at n. 9 (emphasis added). On the contrary, whether the petition, *as revealed at the hearing*, shows an actual loss of majority status is controlling. *Id.* (emphasis added). Therefore, the petition signers’ testimony regarding the circumstances under which they signed and who gathered each signature is highly relevant, as it demonstrates the each signature must be counted, which in turn objectively establishes loss of majority status.

D. Subjective Evidence is Relevant to a Tainted Withdrawal Claim.

To determine whether there is a causal connection between unfair labor practices and employees’ disaffection, the Board considers the following factors: (1) the length of time between the unfair labor practices and the withdrawal of recognition; (2) the nature of the illegal acts,

including the possibility of their detrimental or lasting effect on employees: (3) any possible tendency to cause employee disaffection from the union; and (4) the effect of the unlawful conduct on employee morale, organizational activities, and membership in the union. *Master Slack Corp.*, 271 NLRB 78, 84 (1984).

Employers have indeed been allowed to offer subjective testimony to support a defense of a tainted withdrawal claim. “Although the standard for determining whether the General Counsel has met his burden of proving a causal connection is an objective one, the Board has, on occasion, allowed an employer to offer subjective testimony from employees indicating that their disaffection from the Union was unrelated to the un-remedied unfair labor practices.” *Ntn-Bower Corp. & Int’l Union, United Auto., Aerospace & Agric. Implement Workers of Am., Afl-Cio Clc*, 10-CA-38816, 2012 WL 506370 (Feb. 15, 2012).

Such is the case here. Your Honor ruled on the record during the hearing that he would allow at least *some* testimony regarding the circumstances of the withdrawal of recognition as it relates to the underlying unfair labor practice charges. Although not necessarily known or relied upon by Wyman Gordon in withdrawing recognition, it is highly relevant to the circumstances of the withdrawal itself. For example, no witnesses testified that they were aware of any discipline or chilling of communication based on the Confidentiality Statement, the subject of one of the unfair labor practices charges. In fact, numerous witnesses testified to the opposite. Likewise, witnesses testified that the delayed but retroactive wage increase had no bearing on their view of the Union.

Such evidence is directly related to establishing that the allegations, even if true, had no possible tendency to cause employee disaffection from the union, nor did they effect employee morale, organizational activities, and membership in the Union. The petition-signers’ testimony

go to the heart of the *Master Slack* elements, which have nothing to do with whether Wyman Gordon knew of the information or relied upon it at the time of the withdrawal.

The General Counsel's Motion conflates *Levitz*, which provides the standard for establishing an unlawful withdrawal of recognition generally, and *Master Slack*, which governs the analysis for establishing a tainted withdrawal. In doing so, the General Counsel inappropriately requests that relevant evidence be excluded. Accordingly, the Motion should be denied.

III. CONCLUSION

For the foregoing reasons, Wyman Gordon opposes the General Counsel's Motion in Limine and respectfully requests that the ALJ deny the Motion.



Dated: June 15, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of June, 2018, I e-filed the foregoing **RESPONDENT'S OPPOSITION TO THE GENERAL COUNSEL'S MOTION IN LIMINE** with the Division of Judges, and served a copy of the foregoing document via e-mail to all parties in interest, as listed below:

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